88-631

No. _____

Supreme Court, U.S.
FILED
OCT 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

[redacted] COX ENTERPRISES, INC., d/b/a "WACO TRIBUNE HERALD," AND MARY ANN KREPS,

Petitioners,

v.

JOHN B. GUINN,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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Counsel of Record

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APPENDIX A

COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT

JOHN B. GUINN,

Appellant,

v.

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC., MARY ANN KREPS, AND TEXAS NEWSPAPERS, INC. AND COX ENTERPRISES, INC. d/b/a/ WACO TRIBUNE-HERALD,

Appellees.

No. B14-86-674-CV.

Appeal from the 80th District Court
of Harris County
Trial Court No. 84-27303

OPINION

Appellant, John B. Guinn (Guinn), filed a defamation action against appellees, Texas Newspapers, Inc., Cox Enterprises, Inc., Mary Ann Kreps, and Texas Newspapers, Inc. and Cox Interprises, Inc. d/b/a/ Waco Tribune-Herald (the newspaper, Kreps and/or appellees). The trial court granted summary judgment in favor of appellees. We reverse the judgment of the trial court and remand the cause for trial.

Guinn's suit against appellees resulted from an inaccurate article written by Kreps, a legal reporter for the Tribune-Herald, which was published by the newspaper. The article in question falsely stated that Guinn, who was both a practicing attorney and elected justice of the peace in Coryell County, Texas, had been convicted of felony theft. According to Kreps' affidavit, included in the summary judgment

proof, the reporter had unintentionally transcribed Guinn's name in place of that of the defendant whom Guinn represented. The article in its entirety read as follows:

> John B. Quinn, 44, of Coperas Cove was given a five-year probated sentence and ordered to pay restitution for theft on a government reservation.

Guinn alleged in his first amended original petition that the published item was libelous since it imputed unfitness for his profession as a member of the State Bar of Texas; injured him in his profession; held him up to public ridicule and disgrace; and intended to cause his reputation to be impeached. He sought $50,000 in general and special damages plus an additional $100,000 in punitive damages.

Appellees moved for summary judgment on the grounds that since Guinn was a "public figure" [sic] the *New York Times* "actual malice" standard applied. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964).[1] The motion stated further that the summary judgment proof, through Mary Ann Kreps' affidavit, established the article was published without actual malice.

The trial court granted summary judgment in favor of appellees. Guinn now appeals the renditon of summary judgment in two points of error. He claims summary judgment was improperly granted because the trial court erred in holding him to be a public figure as a matter of law and in finding an absence of malice as a matter of law. Guinn contends there are genuine issues of material fact as to his status as a public figure, and as to the absence of actual malice. We agree with his first contention. In view of our

---

[1] The *New York Times* rule permits recovery by a public official in a defamation suit if the plaintiff can prove the defamatory statement was made with constitutional or "actual malice," *i.e.,* with knowledge of the statement's falsity or with reckless disregard for its truth or falsity. *New York Times Co.* v. *Sullivan,* 376 U.S. at 279-80, 85 S. Ct. at 725-26.

disposition of point of error one, it is unnecessary to discuss the merits of Guinn's second point.

In his first point of error, Guinn asserts the trial court erred in holding him a public figure as a matter of law. Appellees' summary judgment motion alludes only to Guinn's "public figure" status. The motion fails to claim alternately that Guinn was a public official. However, appellees take the position that "public figures" and "public officials" are legally equivalent for purposes of the *New York Times* rule, as both types of plaintiffs must establish by clear and convincing evidence that a libelous statement was published with actual malice. Guinn concedes he was a "*per se,* elected public official" in Coryell County by virtue of holding governmental office. *See Gertz* v. *Welch,* 418 U.S. 323, 94 S. Ct. 2997 (1974). Therefore, appellees argue, the issue of whether or not Guinn was a public figure is irrelevant, since his public official status automatically invokes the actual malice standard.

Assuming the validity of appellees' argument of legal equivalence, we nevertheless hold the summary judgment proof is insufficient to establish as a matter of law Guinn's status as either a public figure or a public official. We discuss only Guinn's "public official" status, since he was clearly an elected official. Appellees have submitted no proof as to his "public figure" status. *See Curtis Publishing Company* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 130, 87 S. Ct. 1975 (1967).

In order to entitle them to summary judgment as a matter of law, appellees must meet their burden of showing no genuine issue of material fact exists as to Guinn's status as a public official. Tex. R. Civ. P. 166-A; *City of Houston* v. *Clear Creek Basin Authority,* 589 S.W.2d 671, 678 (Tex. 1979); *Beaumont Enterprise & Journal* v. *Smith,* 687 S.W.2d 729, 730 (Tex. 1986). Moreover, every reasonable

inference must be indulged in favor of Guinn, the nonmovant, and any doubts resolved in his favor. *Hudnall* v. *Tyler Bank and Trust Company,* 458 S.W.2d 183, 185 (Tex. 1970).

Applying those standards, we hold the summary judgment proof raises genuine issues of material fact as to Guinn's status as a public official, precluding summary judgment. Guinn's deposition, included in appellees' proof, establishes him as a justice of the peace in Coryell County. He was appointed in 1981 to fill an unexpired term, was subsequently elected in November 1981, and was holding office when the newspaper published the allegedly defamatory piece in Waco on January 23, 1984. He was thus undisputedly a public official in Coryell County.

However, it is also undisputed that the newspaper item did not refer to Guinn in his official capacity; it named him "John B. Guinn" rather than "Judge Guinn." Furthermore, the content of the article did not expressly relate to Guinn's official conduct as a justice of the peace, nor was it concerned with Guinn's performance of his official duties. *Foster* v. *Laredo Newspapers, Inc.,* 541 S.W.2d 809, 814-15 (Tex. 1976). Appellees cite case law for the proposition that no charge is irrelevant to Guinn's official conduct, since there is always an implied relationship to his position.[2] Therefore, they claim, the actual malice standard must apply. Although the United States Supreme Court has interpreted the official conduct concept broadly, we hold its application does not include as a matter of law an individual who was proved only to be an elected justice of the peace in his own community. We find nothing in appellees' proof to indicate Guinn was known as a public official beyond the

---

[2] *See Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 91 S. Ct. 628 (1971); *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 91 S. Ct. 621 (1971); *Garrison* v. *Louisiana,* 379 U.S. 64, 85 S. Ct. 209 (1964).

confines of his region. *See Durham* v. *Cannan Communications, Inc.*, 645 S.W.2d 849, 850 (Tex. App.-Amarillo 1982, writ dism'd w.o.j.) (no proof submitted as to appellant's fame or notoriety in the community; appellant was not a public figure as a matter of law). We note the Kreps affidavit stated the reporter herself was not acquainted either with Guinn or his client (defendant Fuller), nor was Kreps aware of Guinn's elected status: "Prior to January 23, 1984, I had never heard of and did not know either Michael Blair Fuller or John B. Guinn."

We hold material fact issues were raised as to whether Guinn was a public official (or a public figure) within the purview of the *New York Times* actual malice standard. The summary judgment proof does not support the trial court holding that Guinn achieved either status as a matter of law. Guinn's first point of error is sustained.

Appellees' summary judgment motion attempts to establish the applicability to Guinn of the actual malice standard, and then to negate the existence of fact issues regarding actual malice. Because we have concluded appellees have not proved Guinn a public figure/public official as a matter of law, it is unnecessary to consider the existence of actual malice fact issues. *Foster* v. *Laredo Newspapers, Inc.*, 541 S.W.2d at 820; *Durham* v. *Cannan Communications, Inc.*, 645 S.W.2d at 851. We therefore do not address the merits of Guinn's second point of error.

Negligence has been adopted as the standard of liability in defamation actions by private individuals. Since appellees do not assert a right to summary judgment premised upon a negligence standard, we do not here determine whether the summary judgment proof negates negligence fact issues. *Foster* v. *Laredo Newspapers, Inc.*, 541 S.W.2d at 820; *Durham* v. *Cannan Communications, Inc.*, 645 S.W.2d at 851.

The judgment of the trial court is reversed and the cause remanded for trial.

/s/ George T. Ellis
Justice

Judgment Reversed and Opinion filed July 2, 1987. Panel consists of Justices Pressler, Murphy and Ellis.

Publish — TEX. R. APP. P.90.

JOHN B. GUINN,

Appellant,

v.

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC., MARY ANN KREPS, AND TEXAS NEWSPAPERS, INC. AND COX ENTERPRISES, INC. d/b/a/ WACO TRIBUNE-HERALD,

Appellees.

No. B14-86-674-CV.

Appeal from the 80th District Court
of Harris County
Trial Court No. 84-27303

JUDGMENT

This cause, an appeal from the judgment in favor of appellees, Texas Newspapers, Inc., Cox Enterprises, Inc., Mary Ann Kreps, and Texas Newspapers, and Cox Enterprises, Inc., d/b/a Waco Tribune-Herald, signed June 26, 1986, came on to be heard on the transcript of the record. We have inspected the record and find error in the judgment. We therefore order the judgment of the court below reversed and remand the cause for proceedings in accordance with the court's opinion.

We order appellees, Texas Newspapers, Inc., Cox Enterprises, Inc., Mary Ann Kreps, and Texas Newspapers, Inc. and Cox Enterprises, Inc. d/b/a Waco Tribune-Herald, to pay all costs incurred by reason of this appeal.

This decision is ordered certified below for observance.

Reversed and Remanded and Opinion filed July 2, 1987.

APPENDIX B

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 6, 1988

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Houston TX 77002

Mr. P. M. Johnston
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Waco TX 76703

Mr. Minor L. Helm, Jr.
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Smith and Steele
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909 Fannin at McKinney
Houston TX 77010

Mr. Wayne Fisher
Fisher, Gallagher, Perrin & Lewis
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Houston TX 77002

RE: Case No. C-6770
STYLE: TEXAS NEWSPAPERS, INC. ET AL.
v. JOHN B. GUINN

Dear Counsel:

The application for writ of error in the above-styled case was this day denied with the notation, Writ Denied.

Chief Justice Phillips not sitting.

Respectively yours,
Mary M. Wakefield, Clerk
By /s/ BLANCA E. MORIN
Deputy

APPENDIX C

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

July 13, 1988

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70th Floor, Allied Bank Plaza
1000 Louisiana
Houston TX 77002

RE: Case No. C-6770
STYLE: TEXAS NEWSPAPERS, INC. ET AL.
v. JOHN B. GUINN

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectively yours,
Mary M. Wakefield, Clerk
By /s/ BLANCA E. MORIN
Deputy

APPENDIX D

Fourteenth Court of Appeals

J. CURTISS BROWN
CHIEF JUSTICE

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE L. DRAUGHN
GEORGE T. ELLIS
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MARY JANE SMART
CLERK

HELEN A. CASSIDY
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PHONE
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August, 18, 1988

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Hon. Minor L. Helm, Jr.
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Post Office Box 770
Waco, TX 76703

RE: CASE NO. 14-86-00674-CV
TRIAL COURT CASE NO. 84-27303

STYLE: Guinn, John B.
V: Texas Newspapers, Inc., et al

Counsel:

Please be advised that on this date the Court GRANTED appellee's motion to stay the mandate in the above captioned cause; stay extended to and including November 16, 1988.

Respectfully yours,

MARY JANE SMART, CLERK

By /s/ CHARLENE MITCHELL
DEPUTY

APPENDIX E

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED: May 30, 1986. RAY HARDY, District Clerk, Harris County, Texas.

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80th JUDICIAL DISTRICT

NO. 84-27303

JOHN B. GUINN
VS.
TEXAS NEWSPAPERS, INC., *et al.*

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Texas Newspapers, Inc., Cox Enterprises, Inc., d/b/a Waco Tribune-Herald and Mary Ann Kreps, Defendants in the above-captioned cause (hereinafter "Defendants"), and files their Motion for Summary Judgment. As grounds therefor, Defendants would respectfully show the Court as follows:

1.

Plaintiff, John B. Guinn, alleges a cause of action for libel as a result of a newspaper article that appeared in the Waco *Tribune-Herald* on January 24, 1984. As is shown by the pages of the deposition of the Plaintiff attached hereto as Exhibit "A", at the time said article was written, the Plaintiff was and is today a Justice of the Peace in Coryell County, Texas. As such, the Plaintiff is a public figure.

2.

Attached hereto is the Affidavit of Mary Ann Kreps, the reporter responsible for the Article in question. As is demonstrated in that Affidavit, at no time did she or did anyone else at the newspaper act with "actual malice" as that term has been defined by the Texas and United States Supreme Courts.

3.

The article complained of does not refer to the Plaintiff in his capacity as Justice of the Peace. However, the United States Supreme Court has stated that a charge of criminal conduct against an official, no matter how remote in time or place, is always relevant to his fitness for office for purpose of applying the rule requiring a showing of actual malice for recovery by a public office. *Monitor Patriot Company* v. *Roy*, 401 U.S. 265, (1971), *Ocala Star-Banner Company* v. *Damron*, 401 U.S. 295, 300 (1971). As such, Defendants are entitled to summary judgment herein.

WHEREFORE, PREMISES CONSIDERED, Texas Newspapers, Inc., Cox Enterprises, Inc., d/b/a Waco Tribune-Herald and Mary Ann Kreps, Defendants, pray that this Motion be set for hearing, that upon such hearing summary judgment be granted in their favor, that Plaintiff take nothing by reason of his suit, and that Defendants recover their costs, and for such other and further relief as may be appropriate.

Respectfully submitted,
LIDDELL, SAPP & ZIVLEY

By: /s/ D. Mitchell McFarland
D. MITCHELL McFARLAND*
By Laura Gibson
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Attorneys For Defendants
TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC., d/b/a WACO TRIBUNE-HERALD, and MARY ANN KREPS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on Plaintiff's attorneys of record, Mr. Shelton Smith, Smith & Cable, 8th Floor, Two Houston Center, Houston, Texas 77010, by hand delivery, on this 30th day of May, 1986.

/s/ D. Mitchell McFarland
D. MITCHELL MCFARLAND
*By Laura Gibson

EXHIBIT A

No. 84-27303

JOHN B. GUINN

VS

TEXAS NEWSPAPERS, INC.,
AND COX ENTERPRISES, INC.,
DBA WACO ENTERPRISES, INC.,
DBA WACO TRIBUNE-HERALD
and MARY ANN KREPS

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80TH JUDICIAL DISTRICT

DEPOSITION OF:
JOHN B. GUINN

all current.

Q. Have you ever been accused of some fraud or deceit?

A. Maybe by some old girl friends at sometime, but in the legal sense, never.

Q. Ever filed for bankruptcy?

A. No.

Q. Ever been elected to public office?

A. Yes.

Q. What?

A. Two years ago I was elected justice of the peace, Precinct 1, Coryell County. To finish that, I had served in that capacity since 1981. I was appointed to fill an unexpired time.

Q. You were appointed in 1981?

A. Yes.

Q. And you were reelected when?

A. Two years ago in the general election.

Q. In 1981?

A. November of '81.

Q. And then you served until the end of 1983?

A. I am still serving.

Q. You are a justice of the peace of Coryell County now?

A. Yes.

Q. You were justice of the peace of Coryell County when the article was written?

A. Yes.

Q. And what salary do you receive for that position?

A. Approximately $12,000 a year.

Q. Are you running for reelection this year?

A. No.

Q. Your term is —

A. They are four year terms.

Q. So you are term will expire in?

A. 1986.

Q. Do you intend to run for reelection?

A. I have no idea.

Q. Do you have any aspiration for any other political office?

A. Not really.

Q. Have you ever been appointed to any other office other than the justice of the peace position?

A. I am currently and have been for some time an associate city judge. I serve when the city judge or the municipal judge is unavailable.

Q. For Copperas Cove?

A. Yes.

Q. And what do you preside over in that capacity?

A. The municipal court when I sit.

Q. And how long have you been an associate city judge?

A. I believe, Mr. McFarland, since the latter part of 1980. Sometime before I was appointed as J.P., a few months anyway.

Q. And you currently hold that position?

A. Yes.

Q. And you held that position when the article was written?

A. Yes.

Q. And what kind of salary do you receive for that?

A. $400 a month.

Q. A month?

A. A month. I am contract labor.

Q. Other than that position, have you ever been pointed to any other public offices?

A. I have served in the past on the Coryell County Child Welfare Board. It has been a number of years since I served on that body.

Let me think for just a moment. I served as counsel for the Charter Commission, the City of Copperas Cove.

Q. Were they drafting a new charter?

A. A charter. Copperas Cove was the largest general law city in the state until the charter was adopted. I believe that was in '79.

I can't recall any other — I can't recall any other public functions.

Q. What about any other boards or commissions or anything like that?

A. And you are speaking only in the public sector? You are not including the Rotary Club or anything like that?

Q. I will get to that.

Any other boards or commissions?

A. Not that I can.

Q. How about the bar activities?

A. I served as an official in our Coryell County Bar.

Q. What designation?

A. Treasurer. That was last year.

Q. You are not that currently?

A. No, sir.

Q. That expired at the end of the year?

A. I believe that we operate from July to

EXHIBIT B

No. 84-27303

JOHN B. GUINN

VS.

TEXAS NEWSPAPERS, INC., *et al.*

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80TH JUDICIAL DISTRICT

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS
COUNTY OF MCLENNAN

BEFORE ME, the undersigned authority, personally appeared MARY ANN KREPS, known to me to be the person whose name is subscribed to the foregoing instrument, and being by me first duly sworn, did depose and state:

My name is MARY ANN KREPS, I am over 21 years of age, I have not been convicted of a felony, and I have personal knowledge of the facts and matters stated herein. I am currently an employee of Texas Newspapers, Inc., a division of the Cox Enterprises, Inc., the publisher of the *Tribune-Herald* in Waco, Texas.

In January 1984, I was working as a reporter for the *Tribune-Herald.* As a part of my duties, I covered the county and federal courthouses. In dealing with matters at the federal courthouse, I would contact the federal clerk's office a few times each week to ask what, if anything, was going on that might be of interest to the newspaper. Depending on the response, I would then go to the clerk's office or the court to observe or report on those matters. As of January 23, 1984, the newspaper had been interested in a matter involving the Farmers Home Administration and as such I was at the federal clerk's office on that day. On that day, several gentlemen

pled guilty to charges relating to a conspiracy to steal $80,000.00 from the Farm Home Administration.

In addition to reporting on the matters relating to the theft, I included in my story other matters that happened in court that day. In reporting on those matters, I reviewed files kept by the clerk to obtain specific data regarding each case. Included in those files is a form which includes pertinent data naming the party, the attorneys, and the sentence imposed in each case. This sheet was generally located on the left side of the file and would generally not be the first page on top of the file. I reviewed this information, transcribed notes onto a notebook for later use.

Using this procedure, I reviewed the file involving Michael Blair Fuller. I inadvertently and unintentionally transcribed the name of his lawyer, John B. Guinn, as that of the defendant. Prior to January 23, 1984, I had never heard of and did not know either Michael Blair Fuller or John B. Guinn. I had no knowledge of either of them at that time except what was disclosed upon my review of the court's file. In reporting the story that appeared in the January 24, 1984 edition of the *Tribune-Herald,* I had no intention of damaging the reputation of Mr. John B. Guinn.

The forms from which I obtained the data to report the story that appeared on January 24, 1984 are generally reliable. They generally contain accurate information of court proceedings. After the article was published, I found that I had made a mistake in reporting his name instead of that of his client, Michael Blair Fuller. In reporting that article, I relied on my notes taken in transcribing data which I believed to be accurate and true. I believed that I had fairly and accurately taken the information from the court's records. I had no awareness of the mistake I had made and did not entertain any doubt as to the truth of the publication at

the time it was published. Only upon being informed of the error, did I realize the mistake I had made.

/s/ Mary Ann Kreps
MARY ANN KREPS

SUBSCRIBED and SWORN TO BEFORE ME on this 28th day of May, 1986.

/s/ Patsie D. Cunningham
Notary Public in and for
the State of Texas

Patsie D. Cunningham
Notary Public
State of Texas

My Commission Expires February 24, 1988

APPENDIX F

FINAL JUDGMENT, SIGNED: June 26, 1986. ENTERED: Volume 3357, Page 704, General Minutes, district Courts, in and for Harris County, Texas.

No. 84-27303

JOHN B. GUINN
VS.
TEXAS NEWSPAPERS, INC., *et al.*

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
80TH JUDICIAL DISTRICT

JUDGMENT

CAME ON TO BE HEARD Defendants' Motion for Summary Judgment and the Court, having considered same, is of the opinion that said motion should be granted; it is, therefore,

ORDERED, ADJUDGED and DECREED that Plaintiff, John B. Guinn, take nothing by reason of this lawsuit, and that all costs incurred herein are adjudged against Plaintiff for the payment of which let execution issue.

SIGNED this 26 day of June, 1986.

/s/ William R. Powell
JUDGE PRESIDING

APPROVED AS TO FORM:

LIDDELL, SAPP & ZIVLEY

BY: /S/ D. MITCHELL MCFARLAND
D. MITCHELL MCFARLAND
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ENTERPRISES, INC., d/b/a WACO
TRIBUNE-HERALD, *and* MARY ANN KREPS